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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANCISCO SANCHEZ ZENDEJAS,

Defendant and Appellant.

H034587; H035343
(San Benito County
Super. Ct. Nos. CR-06-00883;
CR-02-42202)

Defendant Francisco Sanchez Zendejas was sentenced to prison following revocation of probation in two cases. In case number H034587, defendant appeals from the August 5, 2009 judgment of conviction of two counts of possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)) in the County of San Benito Superior Court case numbers CR-02-42202 and CR-06-00883. In case number H035343, he appeals from the post-judgment denial of his motion for correction of presentence custody credits.

In both appeals, defendant contends that he is entitled to a recalculation of presentence custody credit under Penal Code section 4019 as amended effective January 25, 2010.[1] We are not persuaded and hold section 4019, as amended effective January 25, 2010, to be prospective in operation.[2]

[1] All further statutory references are to the Penal Code unless otherwise stated. The parties submitted supplemental briefing regarding whether section 1237.1 barred the

A. *Procedural History*

By information filed on November 18, 2002, defendant was charged with felony possession of a controlled substance, methamphetamine, on or about January 14, 2002 (Health & Saf. Code, § 11377, subd. (a)) (count one). (Case No. CR-02-42202) In that case, he was also charged with four misdemeanors: being under the influence of a controlled substance, namely methamphetamine (Health & Saf. Code, § 11550, subd. (a)) (count two); possession of controlled substance paraphernalia (Health & Saf. Code, § 11364) (count three); resisting a peace officer (§ 148, subd. (a)(1)) (count four); and falsely identifying himself to a peace officer (§ 148.9, subd. (a)) (count five).

On April 17, 2003, defendant pleaded guilty to counts one, two, three, and five and count four was dismissed. The court granted a deferred entry of judgment as to counts one through three and placed defendant on a one-year period of probation on count five (§ 148.9, subd. (a)).

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appeal in H034587. We conclude that it does not because there is no claim that the trial court miscalculated presentence credit at the time of sentencing due to clerical or mathematical error. Section 1237.1 precludes an appeal from a judgment of conviction on the ground that presentence custody credits were miscalculated unless "the defendant first presents the claim in the trial court." This law is intended to require "defendants to seek correction of clerical or mathematical error in calculation of presentence custody credits in the trial court to prevent misuse of appellate process for ministerial purpose." (Assem. Com on Public Safety, Rep. on Assem. Bill No. 354 (1995-1996 Reg. Sess.) as introduced Feb. 10, 1995, pp. 1-2; Sen. Com. on Criminal Procedure Safety, Rep. on Assem. Bill No. 354 (1995-1996 Reg. Sess.) as amended April 27, 1995, p. 2; Sen. Rules Com., Off. of Sen. Flor Analyses, analysis of Assem. Bill No. 354 (1995-1996 Reg. Sess.) as amended April 27, 1995, p. 2.)

[2] Section 4019 was amended again, effective September 28, 2010. (Stats. 2010, ch. 426, § 2.) These newest changes "apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed on or after the effective date" of this enactment. (§ 4019, subd. (g).) Under this latest version, a term of six days will again "be deemed to have been served for every four days spent in actual custody" if all days are earned under section 4019. (§ 4019, subd. (f).)

On May 13, 2004, defendant admitted a violation of the deferred entry of judgment program and the grant was revoked. Defendant was placed on three years of formal probation under Proposition 36 and count five was dismissed pursuant to section 1385 over the district attorney's objection.

A complaint, filed on June 12, 2006, alleged that, on or about April 3, 2006, defendant unlawfully possessed a controlled substance (Health & Saf. Code, § 11377, subd. (a)) (count one) and was under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)) (count two). (Case No. CR-06-00883) On August 23, 2006, defendant waived a preliminary hearing, the complaint was deemed to be the information, and defendant entered pleas of not guilty.

On October 4, 2006, defendant admitted violating probation in case number CR-02-42202. He also pleaded no contest to counts one and two in case number CR-06-00883.

On December 6, 2006, in case number CR-02-42202, the court placed defendant on three years formal probation[3] and ordered him to serve time in county jail as a term of probation. On the same date, the court also placed defendant on three years formal probation in case number CR-06-00883. A probation condition in each case required him to obey all laws.

On February 13, 2009, a notice to show cause why probation should not be revoked was filed against defendant in case number CR-02-42202. The attached petition specified that defendant had failed to obey all laws and alleged that he had been taken into custody for violating section 415, subdivision (3) (offensive words likely to provoke violence).

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[3] According to the probation report submitted for sentencing, defendant's Proposition 36 probation was revoked on December 6, 2006.

On April 23, 2009, an amended notice to show cause why probation should not be revoked was filed against defendant in case number CR-02-42202. The attached petition specified multiple violations of probation.

Following a hearing on April 23, 2009, defendant was found in violation of probation as alleged in the February 13, 2006 notice. A contested hearing on the new allegations of the amended notice was set for May 6, 2009.

On May 4, 2009, a notice to show cause why probation should not be revoked was filed against defendant in case number CR-06-00883. The attached petition specified a number of violations of probation occurring in April 2009.

On July 8, 2009, the court found defendant had violated probation in case number CR-06-00883 by failing to report to the probation department on April 6, 2009, resisting arrest in violation of section 148, subdivision (a)(1), on April 21, 2009, and being convicted of violating section 415 on April 23, 2009.

On August 5, 2009, in case number CR-02-42202, the court sentenced defendant to a two-year prison term on count one with credit for time served. Also on August 5, 2009, in case number CR-06-00883, the court sentenced defendant to a two-year prison term on count one, to be served concurrently with the two-year term imposed in case number CR-02-42202, with credit for time served. Defendant was given 709 days total credit in case number CR-02-42202 and 239 days total credit in case number CR-06-00883. Defendant appealed.

Defendant then filed a motion for correction of his presentence credits in the trial court. He argued that he was entitled to the benefit of the statutory changes to section 4019 and they should be applied retroactively to him. On February 25, 2010, the trial court denied the motion. Defendant appealed.

B. *Presentence Conduct Credit*

When defendant was sentenced on August 5, 2009, his presentence conduct credit was calculated under the former section 4019. Section 4019 was amended in 2009,

effective January 25, 2010 (Cal. Const., art. IV, § 8, subd. (c)(1)), to provide, with exceptions not here applicable, for a prisoner to earn one day of presentence conduct credit for every one day of actual custody served.[4] (See Stats. 2009-2010, 3rd Ex.Sess., ch. 28, § 50, pp. 4427-4428.) Previously existing law had generally authorized two days of presentence conduct credit for every four days spent in actual custody.[5]

The issue whether amended section 4019, effective in January 2010, applies retroactively is presently unsettled and the appellate courts are divided on the question. The California Supreme Court has granted review in a growing number of cases.[6] This court's view is that it is not retroactive.

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[4] As amended, section 4019 provided in pertinent part: "(b)(1) [F]or each four-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has refused to satisfactorily perform labor as assigned by the sheriff, chief of police, or superintendent of an industrial farm or road camp. . . . [¶] (c)(1) [F]or each four-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has not satisfactorily complied with the reasonable rules and regulations established by the sheriff, chief of police, or superintendent of an industrial farm or road camp. . . . [¶] (f) It is the intent of the Legislature that if all days are earned under this section, a term of four days will be deemed to have been served for every two days spent in actual custody . . . ." (Stats. 2009-2010, 3rd Ex.Sess., ch. 28, § 50, p. 4428.)

[5] Section 4019 had read in part: "(b) [F]or each six-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has refused to satisfactorily perform labor as assigned by the sheriff, chief of police, or superintendent of an industrial farm or road camp. [¶] (c) For each six-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has not satisfactorily complied with the reasonable rules and regulations established by the sheriff, chief of police, or superintendent of an industrial farm or road camp. . . . [¶] (f) It is the intent of the Legislature that if all days are earned under this section, a term of six days will be deemed to have been served for every four days spent in actual custody." (Stats.1982, ch. 1234, § 7, p. 4553.)

[6] The Supreme Court has granted review in a number of cases raising the issue whether Penal Code section 4019, as amended to increase presentence custody credits for

1. *General Legal Principles Regarding Retroactivity*

Section 3 provides with regard to the Penal Code: "No part of it is retroactive, unless expressly so declared." This section codifies the general presumption against retroactivity. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208, fn. 11; *In re Estrada* (1966) 63 Cal.2d 740, 746.) "It is a widely recognized legal principle . . . that in the absence of a clear legislative intent to the contrary statutory enactments apply prospectively." (*Evangelatos v. Superior Court*, *supra*, 44 Cal.3d at pp. 1193-1194.) Ordinarily, "the absence of any express provision directing retroactive application strongly supports prospective operation of the [statute]." (*Id*. at p. 1209.)

On the other hand, section 3 is "not a straitjacket." (*In re Estrada*, *supra*, 63 Cal.2d 740, 746.) "Where the Legislature has not set forth in so many words what it intended, the rule of construction should not be followed blindly in complete disregard of factors that may give a clue to the legislative intent. It is to be applied only after, considering all pertinent factors, it is determined that it is impossible to ascertain the legislative intent." (*Ibid*.) Even where the Legislature has not expressly stated its intent that a statute operate retroactively, courts "may infer such an intent from the express provisions of the statute as well as from extrinsic sources, including the legislative

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certain offenders, applies retroactively. (See *People v. Brown* (2010), review granted June 9, 2010, S181963 [lead case; 3d Dist.--held retroactive]; *People v. Rodriguez* (2010), review granted June 9, 2010, S181808 [5th Dist. --held prospective]; *People v. House* (2010) review granted June 23, 2010, S182813 [2d Dist., Div. 1--held retroactive]; *People v. Landon* (2010) review granted June 23, 2010, S182808 [1st Dist., Div. 2--held retroactive]; *People v.Pelayo* (2010) review granted July 21, 2010, S183552 [1st Dist., Div. 5--held retroactive]; *People v. Otubuah* (2010) review granted July 21, 2010, S184314 [4th Dist., Div. 2—held prospective]; *People v. Hopkins* (2010) review granted July 28, 2010, S183724 [6th Dist.--held prospective]; *People v. Norton* (2010) review granted Aug. 11, 2010, S183260 [1st Dist., Div. 3—held retroactive]; *People v. Weber* (2010) review granted Aug. 18, 2010, S184873 [3d Dist.]; *People v. Sonnier* (2010) review granted Sept. 1, 2010, S183604 [4th Dist., Div. 1]; *People v. Eusebio* (2010) review granted Sept. 22, 2010, S184957 [2d Dist., Div. 4 – held prospective].)

history. (See *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1210 . . . (*Evangelatos*).)" (*Preston v. State Bd. of Equalization* (2001) 25 Cal.4th 197, 222.)

2. *Section 59 of 2009 Statute Amending Penal Code Section 4019*

Defendant argues that section 59 of the statute that amended section 4019 demonstrates a legislative intent to make the amended version fully retroactive to all prisoners. He maintains that section 59 of the statute assigns the task of recalculating credits to the California Department of Corrections and Rehabilitation (CDCR) and "if the amendment to section 4019 were prospective only, section 59 would be surplusage . . . ." That uncodified section of the statute reads: "The Department of Corrections and Rehabilitation shall implement the changes made by this act regarding time credits in a reasonable time. However, in light of limited case management resources, it is expected that there will be some delays in determining the amount of additional time credits to be granted against inmate sentences resulting from changes in law pursuant to this act. An inmate shall have no cause of action or claim for damages because of any additional time spent in custody due to reasonable delays in implementing the changes in the credit provisions of this act. However, to the extent that excess days in state prison due to delays in implementing this act are identified, they shall be considered as time spent on parole, if any parole period is applicable." (Stats. 2009-2010, 3rd Ex. Sess., ch. 28, § 59, p. 4432.)

Section 59 of the statute contains no specific language expressing a legislative intent to make the statute's credit provisions retroactive or prospective even though other statutes indicate that the Legislature knows how to express its intent clearly. (See e.g. §§ 296.1 [specified provisions pertaining to collection of specimens, samples and print impressions "shall have retroactive application"]; 12281, subds. (a) and (b) [immunity from criminal prosecution under section 12280 "shall apply retroactively"]; Stats. 2007, ch. 420, § 2, p. 2916 ["It is the intent of the Legislature that the amendments to Section 12022.6 of the Penal Code by this act apply prospectively only and shall not be

interpreted to benefit any defendant who committed any crime or received any sentence before the effective date of this act"].) When considered in the context of the statute's actual credit provisions, it is clear that section 59 of the statute had nothing to do with the timing of the application of the statute's credit provisions.

The statute rewrote a number of custody credit provisions. The applicable Legislative Counsel's Digest states: "This bill would instead provide that certain prisoners shall earn one day of credit for every one day served either in the state prison or in a local facility prior to delivery to the state prison. This bill would provide for up to 6 weeks of additional credit for the successful completion of certain programs offered by the department, as specified. This bill would also expand an existing program for extra time credits for inmates assigned to conservation camps to apply to inmates who are assigned to correctional institutions as inmate firefighters and to inmates who have completed the training for either of those assignments, as specified. This bill would also revise the time credits for certain prisoners confined or committed to a county jail or other specified facilities, as provided. [¶] This bill would also provide criteria for the denial and loss of these credits, and would make various conforming and technical changes." (Legis. Counsel's Dig., Sen. Bill No. 18 (2009-2010 3rd Ex. Sess.) ch. 28, p. 4393.)

The statute added section 2933.05 (Stats. 2009-2010, 3rd Ex. Sess., ch. 28, § 39, p. 4421), which requires the Secretary of the CDCR to "promulgate regulations that provide for credit reductions for inmates who successfully complete specific program performance objectives for approved rehabilitative programming . . . ." (§ 2933, subd. (a).) That section mandates that "[r]egulations promulgated pursuant to this subdivision shall specify the credit reductions applicable to distinct objectives in a schedule of graduated program performance objectives concluding with the successful completion of an in-prison rehabilitation program." (*Ibid.*) It states: "Commencing upon the promulgation of those regulations, the department shall *thereafter* calculate and award credit reductions authorized by this section." (*Ibid.*, italics added.)

The statute also rewrote section 2933.3 and, among other things, added new subdivisions providing for additional conduct credit. Subdivision (b) of section 2933.3 states that "any inmate who has completed training for assignment to a conservation camp or to a correctional institution as an inmate firefighter or who is assigned to a correctional institution as an inmate firefighter and who is eligible to earn one day of credit for every one day of incarceration pursuant to Section 2933 shall instead earn two days of credit for every one day served in that assignment or after completing that training." Subdivision (c) of section 2933.3 provides that "inmates who have successfully completed training for firefighter assignments shall receive a credit reduction from his or her term of confinement *pursuant to regulations adopted by the secretary*." (Italics added.) Section 2933.3 expressly provides that, as to the newly added subdivisions, "[t]he credits authorized in subdivisions (b) and (c) shall only apply to inmates who are *eligible after July 1, 2009*." (§ 2933.3, subd. (d), italics added.)

Section 59 of the statute (Stats. 2009-2010, 3rd Ex. Sess., ch. 28, § 59, p. 4432) cannot be reasonably construed, in light of these other specified provisions, as expressing any general legislative intent to give all the new credit provisions full retroactive effect. Courts "must harmonize 'the various parts of a statutory enactment . . . by considering the particular clause or section in the context of the statutory framework as a whole.' [Citations.]" (*People v. Murphy* (2001) 25 Cal.4th 136, 142.)

Furthermore, other new provisions indicate that conduct credit changes must be earned, which in turn implies that inmates generally earn conduct credits as provided by the law in effect at the time. The Legislature explicitly stated that "[c]redit is a privilege, not a right" and it "must be earned and may be forfeited." (§ 2933, subd. (c); see § 2933.05, subd. (b) ["Program credit is a privilege, not a right"].) Subdivision (f) of section 4019 as amended effective January 25, 2010, stated in pertinent part, with an exception not here applicable: "It is the intent of the Legislature that if all days are *earned* under this section, a term of four days will be deemed to have been served for every two

days spent in actual custody . . . ." (Stats. 2009-2010, 3rd Ex.Sess., ch. 28, § 50, p. 4428, italics added.) Retroactive application of the increases in presentence custody credits under the amended section 4019 would result in a windfall to prisoners who were held in presentence custody before its effective date.

Section 59's legislative command that the CDCR "implement the changes made by this act regarding time credits in a reasonable time" and that "[a]n inmate shall have no cause of action or claim for damages because of any additional time spent in custody due to reasonable delays in implementing the changes in the credit provisions of this act" (Stats. 2009-2010, 3rd Ex. Sess., ch. 28, § 59, p. 4432) is most reasonably understood as referring to the CDCR's new administrative responsibilities with regard to implementation of the forthcoming mandated regulations. It reflects the Legislature's intent to avoid state liability for administrative delays in applying the new credit regulations and provisions.

As indicated by the limited retroactivity provision contained in section 2933.3, subdivision (d), the Legislature knew how to expressly make a provision retroactive if it wished. Certainly, no particular legislative intent regarding the retroactivity of section 4019, as amended effective January 25, 2010, may be gleaned from section 59 of the enacted bill. In our view, section 59 of the statute does not evidence any legislative intent to have the CDCR recalculate, under the 2009 version of section 4019, the presentence conduct credit of every prisoner who is in its custody and was sentenced before its effective date of January 25, 2010. That would be an enormous, and possibly costly, undertaking.

3. *In re Estrada*

Defendant's main argument is that he is entitled to the benefit of amended section 4019, effective January 25, 2010, because it became effective before his judgment was final and it has no savings clause. In *In re Estrada*, *supra*, 63 Cal.2d 740, the Supreme Court considered an amendatory act reducing both the term of imprisonment for a

particular crime and the minimum prison time necessary for parole eligibility. (*Id*. at p. 744.) The defendant in that case committed the crime before the new law was enacted but he was tried, convicted, and sentenced after the new law was in effect. (*Ibid*.) The court concluded that "where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed."[7] (*Id*. at p. 748.) It stated: "The key date is the date of final judgment. If the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then, in our opinion, it, and not the old statute in effect when the prohibited act was committed, applies."[8] (*Id*. at p. 744.) This conclusion was predicated upon the intent of the Legislature, which the court found implicit.

The court in *Estrada, supra,* 63 Cal.2d 740 reasoned: "When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as

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[7] A "saving clause" is generally defined as a "statutory provision exempting from coverage something that would otherwise be included" and is "generally used in a repealing act to preserve rights and claims that would otherwise be lost." (Black's Law Dictionary (9th ed. 2009) p. 1461.) The rule at common law was that the "outright repeal of a criminal statute without a saving clause bars prosecution for violations of the statute committed before the repeal." (*Sekt v. Justice's Court of San Rafael Tp.* (1945) 26 Cal.2d 297, 304) This rule was "based on presumed legislative intent, it being presumed that the repeal was intended as an implied legislative pardon for past acts." (*Ibid*.) California has a general statutory savings clause for criminal prosecutions of offenses under criminal law that has been repealed: "The termination or suspension (by whatsoever means effected) of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so terminated or suspended, unless the intention to bar such indictment or information and punishment is expressly declared by an applicable provision of law." (Gov. Code, § 9608.)

[8] A judgment is not final for the purpose of retroactive application of an amendment to a criminal statute lessening punishment until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed. (*People v. Vieira* (2005) 35 Cal.4th 264, 306.)

punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final. This intent seems obvious, because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology." (*Id*. at p. 745.)

In *People v. Hunter* (1977) 68 Cal.App.3d 389, another case cited by defendant, Hunter was placed on felony probation conditioned upon serving one year in county jail. (*Id*. at p. 390.) In 1976, after probation had been granted, former section 2900.5 was amended so that actual days of presentence custody were credited against the jail time imposed as a condition of probation as well as against a prison sentence. (Stats. 1976, ch. 1045, § 2, pp. 4665-4666.) After that amendment became effective, the defendant unsuccessfully sought credit for his time in presentence custody (85 days) against the one-year period in the trial court. (*Id*. at p. 390.) The appellate court reached the issue of retroactivity even though the one-year period was going to expire before its opinion became final. (*Id*. at p. 391.)

The appellate court in *Hunter* concluded that "the statutory history of the amendment to [former] section 2900.5 and the rule of construction of sentencing statutes declared by our Supreme Court in *In re Estrada* (1965) 63 Cal.2d 740 . . . require that the 1976 amendment to [former] section 2900.5 be construed as effective to sentences imposed prior to the effective date by judgments not yet final on January 1, 1977." (*People v. Hunter, supra,* 68 Cal.App.3d at p. 391.) The court noted that the Legislature had not included any "prospective limitation" and found that significant in light of the legislative history showing an awareness of *In re Kapperman* (1974) 11 Cal.3d 542,

which had recently invalidated former section 2900.5's provision making presentence custody credits available only prospectively.[9] (*Id*. at p. 392.)

Hunter involved credit for actual days of presentence custody and, therefore, is readily distinguishable from this case. The purpose of credit for actual time already served in presentence custody is completely different than the objective of conduct credit provisions to induce good behavior and willingness to work. (See *People v. Pottorff* (1996) 47 Cal.App.4th 1709, 1718-1719.)

In *People v. Doganiere* (1978) 86 Cal.App.3d 237, also cited by defendant, the issue was whether another amendment to former section 2900.5 applied to Doganiere who had served time in county jail as a condition of probation and later was sentenced to state prison following revocation of probation. The trial court had given him "credit for the time actually spent in custody under his prior probation order." (*Id*. at p. 238.) For the first time on appeal, he sought to have the credit for the good time/work time, which he had already earned under former section 4019 and for which he had received credit against his county jail time, applied against his prison sentence under the 1978 amendment to former section 2900.5. (*Id*. at pp. 238-239.) Former section 2900.5 was amended in 1978 as an urgency measure to provide credit for "all days of custody of the defendant, including days served as a condition of probation . . . , and including days credited to the period of confinement pursuant to Section 4019" (Stats. 1978, ch. 304, §§ 1, 2, pp. 632-633, eff. June 28, 1978). Since its enactment in 1976, section 4019 had provided for work time and good time credit to be given to an inmate confined or committed to county jail as a condition of probation. (Stats. 1976, ch. 286, § 4, p. 595.)

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[9] *Kapperman* struck down, as a violation of equal protection, the provision making credit for actual days in presentence custody available only to those prisoners delivered into prison custody on or after the effective date of former section 2900.5 (Stats. 1971, ch. 1732, § 2, p. 3686) and is discussed more fully at pp. 17-18, post.

The appellate court in *Doganiere* recognized that *Estrada* had been followed in *Hunter*. (*People v. Doganiere*, *supra*, 86 Cal.App.3d at p. 239.) The court reasoned: "It would appear to be fair, just and reasonable to give prisoner A, who has been a model prisoner and by reason thereof served only five months of his six-month sentence, credit for the full six months if we are going to give credit for the full six months to prisoner B, who is recalcitrant, hard-nosed, and spent his entire term violating the rules of the local county jail. Thus, the Legislature has said that not only will we give you credit for time served, we will give you credit for the time you would have served if you had not behaved yourself. Under *Estrada*, it must be presumed that the Legislature thought the prior system of not allowing credit [against a state prison sentence] for good behavior [already earned in county jail] was too severe." (*Id*. at pp. 239-240.) The court held that "the 1978 amendment to Penal Code section 2900.5 should be applied retroactively as to all nonfinal judgments." (*Id*. at p. 240.)

We disagree with defendant's assertion that the facts of *Doganiere* "are on all fours with this case." Defendant Doganiere had actually already earned the conduct credit under former section 4019. In the absence of any other express statement of legislative intent, it was reasonable to find an implicit legislative intent to give a defendant ultimately sentenced to state prison the benefit of conduct credit he had already earned while serving time in county jail as a condition of probation. In contrast, defendant in this case seeks the boon of amended section 4019's conduct credit provisions that were not in effect while he was in presentence custody. Moreover, in this case, the amendments at issue were prompted by an express legislative intent different from the intent inferred in *Estrada, Hunter, or Doganiere*.

In *Estrada, supra*, 63 Cal.2d 740, the Supreme Court characterized the issue of retroactivity as one of legislative intent and made clear that "[h]ad the Legislature expressly stated which statute should apply, its determination, either way, would have

been legal and constitutional."[10] (*Id*. at p. 744.) The court stated that "if the saving clause expressly provided that the old law should continue to operate as to past acts, so far as punishment is concerned that would be the end of the matter." (*Id*. at p. 747.) The Supreme Court subsequently emphasized in another case that "[t]he Legislature properly may specify that [statutes lessening the punishment for a particular offense] are prospective only, to assure that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written. [Citation.]" (*In re Kapperman, supra*, 11 Cal.3d at p. 546.)

The Supreme Court has stated that generally "a statute's retroactivity is, in the first instance, a policy determination for the Legislature and one to which courts defer absent 'some constitutional objection' to retroactivity. (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 244 . . . .)" (*Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 841.) It is well established that "[t]he fundamental rule of statutory construction is that the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. [Citations.]" (*Select Base Materials, Inc. v. Board of Equalization* (1959) 51 Cal.2d 640, 645.)

This case is certainly distinguishable from *Estrada*. First, because section 4019, as amended effective January 25, 2010, does not reduce the specific penalty for a particular crime, it may not be inferred that the Legislature acted with the implicit intent to reduce the criminal punishment for a certain offense. Second, in this case, unlike

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[10] Years after *Estrada*, the California Supreme Court confirmed in a case involving application of an initiative measure limiting tort liability for noneconomic damages: "California continues to adhere to the time-honored principle, codified by the Legislature . . . , that in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application. The language in *Estrada* [and other cases] should not be interpreted as modifying this well-established, legislatively-mandated principle." (*Evangelatos v. Superior Court*, *supra*, 44 Cal.3d at pp. 1208-1209.)

Estrada, we have concrete evidence of the legislative intent underlying the statute and that is not a general intent to lessen punishment of convicts for penological reasons.

The primary intent of the legislation was to lessen the state's fiscal burden. Section 62 of the statute states: "This act addresses the fiscal emergency declared by the Governor by proclamation on December 19, 2008, pursuant to subdivision (f) of Section 10 of Article IV of the California Constitution." (Stats.2009-2010, 3rd Ex.Sess., ch. 28, § 62, p. 4432.) The legislative committee analyses are devoid of any indication that the Legislature intended retroactive application of the statutory changes to section 4019 and confirm the budgetary purposes of the bill. (See Sen. Rules Com., Office of Sen. Floor Analyses, Sen. Bill. No. 18 (2009-2010, 3rd Ex.Sess.) as introduced ["This bill expresses the intent of the Legislature to enact statutory changes relating to the Budget Act of 2008"]; Sen. Rules Com., Office of Sen. Floor Analyses, Sen. Bill. No. 18 (2009-2010, 3rd Ex.Sess.) as amended Aug. 31, 2009, p. 1 [Assembly amendments deleted prior statement of intent and the bill "now makes changes related to public safety necessary to implement the Budget Revisions of the 2009 Budget"].)

Obviously, by increasing the amount of credits available to certain inmates, qualifying inmates' terms will be shortened and prison populations reduced, resulting in reduced costs to the state. But retroactive application of section 4019, as amended effective January 25, 2010, would fly in the face of the Legislature's express intent that prisoners earn statutorily authorized custody credits and would have no effect upon prisoners' past conduct in presentence custody. Prospective application of section 4019, as amended effective January 25, 2010, on the other hand, comports with the purpose of conduct credits and reduces the state's prison expenses going forward when applicable.

In sum, the legislative history and purpose of section 4019 as amended are most consistent with its prospective application. We do not find any implicit legislative intent to decrease punishment for penological reasons as found in *Estrada* and, therefore, we have no reason to depart from the general presumption against retroactivity.

4. *Equal Protection*

While this court is aware of the principle of statutory construction that requires a statute to be construed to avoid constitutional infirmity if possible (see *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 509; *People v. Davis* (1968) 68 Cal.2d 481, 483-484), we discern no equal protection problem created by a purely prospective application. *Estrada*'s retroactivity rule is not constitutionally compelled. (*People v. Floyd* (2003) 31 Cal.4th 179, 189.) Neither *In re Kapperman, supra*, 11 Cal.3d 542 nor *People v. Sage* (1980) 26 Cal.3d 498 compel retroactive application of section 4019 as a matter of equal protection in this case.

In re Kapperman, supra, 11 Cal.3d 542 concerned former Penal Code section 2900.5, which, as enacted in 1971, provided for presentence custody credit against a prison sentence for "all days of custody" in jail. (Stats.1971, ch. 1732, § 2, p. 3686.) "The statute's purpose was 'to eliminate the unequal treatment suffered by indigent defendants who, because of their *inability to post bail*, served a longer overall confinement than their wealthier counterparts. [Citations.]' (*In re Rojas* (1979) 23 Cal.3d 152, 156 . . . , italics added.) Thus, the Legislature enacted section 2900.5 to address pretrial 'incarceration' (*In re Watson* (1977) 19 Cal.3d 646, 651 . . .), and to 'reflect the basic philosophy that when a person is *incarcerated* he is being punished by the reality of *incarceration*.' (*People v. Williams* (1975) 53 Cal.App.3d 720, 723 . . . , italics added.) The statute embodied a 'policy decision . . . that for purposes of credit, precommitment detention should be equated with post-commitment *imprisonment*.' (*In re Kapperman* (1974) 11 Cal.3d 542, 547 . . . , italics added.)" (*People v. Pottorff, supra*, 47 Cal.App.4th at p. 1719.)

The California Supreme Court in *Kapperman* considered the constitutionality of subdivision (c) of former section 2900.5 (Stats.1971, ch. 1732, § 2, p. 3686), which in effect made "the credit prospective only, [by] limiting the application of the section to those persons who are delivered into the custody of the Director of Corrections on or

after March 4, 1972, the effective date of the section." (In re *Kapperman, supra*, 11 Cal.3d at pp. 544-545.) The Supreme Court began by pointing out that the case was not governed by *Estrada* because "[t]he Legislature properly may specify that [statutes lessening punishment for a particular offense] are prospective only, to assure that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written. [Citation.]" (*Id*. at p. 546.) The court concluded that the provision limiting its application to those in prison custody on or after its effective date of March 4, 1972 violated the "California Constitution and the equal protection clause of the Fourteenth Amendment in that it constitutes a legislative classification which is not reasonably related to a legitimate public purpose." (*Id*. at p. 545.) The court stated: "Section 2900.5 does not purport to award credit on the basis of whether a prisoner was incarcerated in a county jail as distinguished from a state prison; rather, credit is granted or withheld solely on the basis of the date on which a person was delivered into the custody of the Director of Corrections." (*Id*. at p. 548.)

The California Supreme Court could conceive of no legitimate public purpose served by excluding all prisoners received into state prison before March 4, 1972 from the benefits of former section 2900.5. (*Id*. at pp. 547-550.) The court "extend[ed] the statutory benefits [of credit for presentence custody] retroactively to those whom the Legislature improperly excluded." (*Id*. at p. 545.)

In *People v. Sage*, *supra*, 26 Cal.3d 498, the defendant was not entitled to presentence conduct credit under former Penal Code section 4019 because that earlier statute did not authorize conduct credit for precommitment jail time for felons, only for misdemeanants. (*Id*. at pp. 502-504.) The Supreme Court concluded there was no rational basis for "denying presentence conduct credit to detainee/felons." (*Id*. at p. 508, fn. omitted.) The court held that the "discrepancy in the presentence jail treatment of misdemeanants and felons violated equal protection. ([*People v. Sage, supra,* 26 Cal.3d] at pp. 506-509.)" (*People v. Buckhalter* (2001) 26 Cal.4th 20, 36.) The court made its

holding retroactive to remedy that arbitrary treatment under the challenged statute. (See *People v. Sage*, *supra*, 26 Cal.3d at p. 509, fn. 7.)

Unlike former section 2900.5 at issue in *Kapperman* or former section 4019 at issue in *Sage*, the newest version of section 4019 does not provide for unequal treatment of similarly situated persons. No equal protection problem arises from its prospective application. (See *People v. Floyd*, *supra*, 31 Cal.4th at pp. 188-191 [no equal protection problem with prospective application of Proposition 36, which generally provided for probation rather than prison for defendants convicted of nonviolent drug possession]; see also *Plyler v. Doe* (1982) 457 U.S. 202, 248 [102 S.Ct. 2382] ["The Equal Protection Clause guarantees similar treatment of similarly situated persons"]; *id*. at p. 216 [but U.S. Constitution does not require things which are different in fact be treated in law as though they were the same]; *In re Eric J.* (1979) 25 Cal.3d 522, 530 ["The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner"]; *Williams v. Walsh* (1912) 222 U.S. 415, 421 [32 S.Ct. 137] [U.S. Supreme Court rejected equal protection challenge to new criminal law, stating " 'the 14th Amendment does not forbid statutes and statutory changes to have a beginning, and thus discriminate between the rights of an earlier and later time' "]; cf. *Dobbert v. Florida* (1977) 432 U.S. 282, 301 [97 S.Ct. 2290] [U.S. Supreme Court rejected equal protection claim of defendant sentenced to death under new statute in effect at time of trial because he was not similarly situated to defendants whose death sentences were commuted when predecessor statute was ruled unconstitutional].) Moreover, we can conceive of a legitimate public purpose served by excluding prisoners from the benefits of section 4019, as amended effective January 25, 2010, with respect to their presentence conduct occurring while former section 4019 was in effect. Retroactive application has no effect on past behavior and prospective application is consistent with the motivational objective

of statutorily authorized presentence custody credits. (Cf. *In re Stinnette* (1979) 94 Cal.App.3d 800, 806.)

Disposition

The judgment of conviction is affirmed in Case Number H034587.

The order denying the post-judgment motion for correction of presentence custody credits is affirmed in Case Number H035343.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.